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on the Discussion Draft "BITS" Legislation

before the House Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet
November 9, 2005

Mr. Chairman and Members of the Subcommittee, thank you very much for inviting me to speak with you today on behalf of the National Cable & Telecommunications Association regarding the new discussion draft legislation addressing Internet Protocol (IP)-enabled and broadband services.

As you know, the cable industry has invested significantly – more than $100 billion since 1996 and nearly $10 billion this year alone – to bring advanced video, high-speed Internet access, and now voice services to tens of millions of Americans across the country. My own company, Insight Communications, has invested hundreds of millions of dollars upgrading and building systems in the last eight years. Broadband is virtually rolled-out to all areas served by the company. Four markets have circuit-switched telephone service and the rest are in the process of rolling-out IP telephony. Cable therefore has a fundamental stake in the ongoing efforts to revise the Communications Act.

The discussion draft is an ambitious effort to devise a national framework for advanced voice, video, and data services. NCTA agrees with you and others on the Committee that new technologies like IP are changing the competitive landscape for all communications services. The use of IP, for example, can facilitate true intermodal competition in all services. The transition from analog to digital video, while not yet complete, is already providing consumers with a more robust array of services and the ability to customize what they watch and when. Other technological developments will offer the ability to access content and information anywhere.

Given the scope and pace of these advances, it is appropriate to take a fresh look at the regulatory framework established in 1996 -- not in order to codify a particular technology as the touchstone of policy, but to reform and hopefully reduce regulation for all providers in way that does not impede future advances. With respect to multichannel video in particular, competition warrants a *comprehensive* re-examination of the existing regulatory framework adopted more than 20 years ago when the video marketplace was far less competitive.

While we agree that a fresh look at regulation is needed, we have serious concerns with the direction and approach of the draft bill. In particular, it treats functionally equivalent services differently, conferring a regulatory advantage on particular technologies. Rather than simply deregulate where market forces warrant, the bill erects a complex new scheme for IP-based and other "integrated" services. Regulatory treatment will turn on whether a provider uses packet-switched transmission or not; whether particular offerings are "subsumed in or subsuming" others; and whether a customer can "integrate" "customizable voice and data capabilities" with "two-way" video programming. The bill is also overregulatory, including first-time-ever regulation of the Internet in the absence of market failure that might justify that regulation.

The uncertainties inherent in this approach and the government micromanagement it invites are unlikely to provide the stable regulatory framework that promotes investment and innovation. By contrast, when Congress largely eliminated economic regulation of the cable industry in 1996 and largely got out of the way of our broadband deployment, cable responded with $100 billion in new investment and an array of advanced services that consumers have embraced.

Principles for Reviewing Current Law

We believe that any review of current law should be guided by three principles.

First, like services should be treated alike, and all providers of those services should play by the same rules. What matters to consumers, and what should matter to policymakers, is not the technology used to provide services, but the services themselves.

Second, there should be minimal economic regulation, allowing competition to rely on market forces wherever possible. The market has worked well to ensure that new developments enabled by technological advances and the integration of advanced services reach consumers. While the Bell companies have touted the integrated features they will offer if granted favorable regulatory treatment, cable offers those services and features today -- and did so as soon as the market showed interest, regardless of regulatory benefit.

For example, just last week, Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications announced the formation of a joint venture, designed to accelerate the convergence of video, wireline, wireless and data communications products and services and bring exciting new capabilities to subscribers. Customers will be able to purchase a "Quadruple Play" or any combination of services, have access to a wireless "third screen," and enjoy other features that integrate cable and wireless services all on a single device. Time Warner customers in some markets today can have a caller ID flash on their television screens when they get a telephone call. Cablevision customers can check their home voicemail from any Internet connection in the world.

The market has responded well to the new services cable offers. There are over 26 million digital cable customers -- up from 12 million in 2001. Upgraded cable systems can offer telephone service over the same cable line that already carries digital video, high speed Internet,

and other advanced services to consumers. As of the end of the Second Quarter of 2005, major MSOs – including Insight, Cox, Charter, Comcast, Cablevision, and Time Warner, along with other cable operators – served approximately 4.4 million residential cable phone customers across the country.

These developments did not require regulatory prompting; they were driven by market demand. Companies facing fierce competition will respond to what consumers want, as providers continuously seek to differentiate themselves and their products and services. Their response should not be driven, or even affected, by a need to fit a service into a particular regulatory box. A regulatory scheme that successfully encourages innovation will not require providers to spend time debating which side of the line a service feature puts them on.

Finally, certain universally recognized social responsibilities must remain in place for all providers of communications services. In the context of voice services, those responsibilities include 911 and E-911, cooperation with law enforcement, and support for universal service within a competitively neutral regime. On the video side, new services and features should not be developed for, and available to, just the wealthiest subscribers -- it should be an important part of the role of all providers to ensure that their service reaches every segment of society. While regulation should be no greater than what is necessary to ensure the fulfillment of those responsibilities -- and there is room to make them consistent across providers -- these important public protections should not be abandoned.

Concerns with the Discussion Draft

Measured against these objectives, the discussion draft raises a number of concerns.

First, the draft bill creates *different* regulatory regimes for like services based on technological distinctions. There are two dangers with having the government picking

technology winners and losers, particularly in a field as dynamic as communications -- the initial technology choice may be wrong, and government cannot anticipate what's around the corner. A technology-based approach creates a perverse incentive for providers to select the technologies they use based on a particular regulatory result even if they do not necessarily respond to consumer demand most effectively and efficiently, and it may lock them into particular technologies long after those technologies have outlived their usefulness.

It wasn't too many years ago, for instance, that this Committee was close to endorsing an *analog* version of HDTV that would have required as much as 12 megahertz of bandwidth for each video channel. Fortunately, digital technology emerged quickly enough to prevent enactment of that policy. Another example from history, this one involving a transmission technology, is perhaps even more relevant to the current effort. Ten years ago, asynchronous transfer mode ("ATM") was considered a primary protocol for networks (strongly promoted by the telephone companies), and IP was thought to be not as applicable for the transmission of data. If Congress had mandated ATM, it would have dramatically slowed the growth of the Internet, and IP's growth would have been hampered.

A more current example that shows the flaws of technology-based regulation is the use of IP to deliver video programming. Some have argued that IP video should be subject to a new regulatory regime, but the fact is that cable operators *already* use IP transport at various points in their networks, including cable modem service and backbone networks. There is no technical limitation to cable operators adopting IP technologies in their retail video services. Such services are being field tested by Time Warner in San Diego and are being studied by the engineering departments of all of the major multiple system operators, including Insight.

SBC has also proposed to use IP in its video distribution network, reportedly to transport and deliver video to the customer premises. At least in part, this appears to be a function of the limited bandwidth available to SBC over its existing copper facilities to transmit video to the home, which required SBC to find a means to deliver only a few channels at a time to the customer rather than all channels as cable has traditionally done. Significantly, many of the services SBC identifies as IP-based are being provided by cable companies today without using IP, including subscription video-on-demand service, multiple camera angle viewing of live sports programs, live traffic and weather feeds.

The point is that as it becomes useful to introduce IP (or any other new technology) into the distribution of video services, *all* providers, including current cable operators, will do so. The regulatory scheme should be structured to encourage, not interfere with, that natural progression. By contrast, a law that favors particular technologies over others will skew this progression and risks deterring innovation and undermining efficiency. Government should not be in the business of picking technology winners and losers. That should be left to the market.

The same danger arises if Congress anoints a particular service for favorable regulatory treatment, as the discussion draft does with broadband video. The features and functions that policymakers demand may not be the same ones that the marketplace wants. In the interest of favorable regulatory treatment, providers may end up devoting significant resources to developing services that consumers have no interest in. In that case, providers and consumers lose. The market, not the government, should drive the course of innovation and investment.

Second, the draft bill favors regulation over market forces. Indeed, it complicates the existing regulatory framework by adding three new regulatory "silos" in addition to the existing ones for voice, video, and data. Providers could fall in one or more of six different regulatory

silos, each with different, and not always consistent, responsibilities. With regard to video, the bill's "broadband video service" would be the fifth category of multichannel provider – after cable, DBS, wireless cable, and open video systems – exacerbating rather than simplifying the current existing competitive imbalance among such providers.

With respect to broadband services, the bill appears to impose forced access obligations on facilities-based Internet access providers, overturning the Supreme Court's *Brand X* decision and the FCC's recent *Wireline Broadband Order*. Forcing facilities-based providers who have chosen not to hold themselves out as common carriers to share their facilities with competitors will deter investment in new networks. By interfering with the property rights of those providers, it also raises a significant takings issue. While perhaps inadvertent – the problem arises from the fact that the definition of BITS now encompasses both the offering of "pure" transmission as well as Internet access service – it is an issue that need not be reopened at all.

What is not inadvertent is the first-time-ever regulation of Internet access services themselves in the form of a "net neutrality" requirement. While the recent revisions to the bill, such as allowing BITS providers to take reasonable measures to protect network reliability, impose some limits on this regulation, there remains a grave danger that these regulations will lock providers into certain business or technology arrangements and hamper their ability to respond to market needs.

In particular, what constitutes "impair[ing]" or "interfer[ing] with" the use of content or services would be the source of constant litigation or the threat of litigation, creating a persistent and deadening overhang to the deployment of broadband services. Anyone unhappy with the terms of their business deal with a broadband provider would inevitably race to the FCC or the courthouse alleging a violation. Given the inherent open-endedness of concepts like

"impairment" or "interference," a provider would have no way of knowing whether the practice complained of will be found to be reasonable or an instance of unlawful interference. Under such a scheme, providers will have little incentive to innovate or to differentiate themselves in the marketplace.

The fact is that nearly everyone in the industry engages in some activity that arguably would fall under the bill's definition of "interfer[ence]" with content or access. For example, several years ago, in an effort to discourage the posting of commercial messages ("spam") on its multiple message boards, Yahoo! adopted a policy of blocking access to Web addresses advertised in spam messages. While some viewed this as a consumer-friendly move, others suggested that Yahoo!'s motive was to hinder competitors -- and, in fact, Yahoo acknowledged that "some of the Web sites . . . blocked from its finance section [were] competitors." Yahoo! and other web portals also have agreements with certain content providers to feature their content or links to particular sites. Microsoft requires people to use Internet Explorer to view streaming video on its MSNBC web site. If the government installs itself to police these kinds of business arrangements, it will seriously compromise the ability of network and content providers to devise new offerings and respond to market demands.

Finally, with respect to matters where continued regulation *is* necessary, particularly in the area of interconnection between new broadband networks and the public switched network, the staff draft does not provide sufficient safeguards. While the cable industry generally supports reducing regulation, the public switched network presents a special case: since the vast number of voice customers will use that network for the foreseeable future, no voice competitor can be successful unless its subscribers can terminate calls to that network and receive calls that originate on it.

There is, very simply, nothing quite like the public switched network. DBS operators did not need to interconnect with cable systems to compete (Congress did conclude that they needed access to cable *programming*, however), and the "network of networks" architecture of the Internet is distributed rather than centralized. So long as the PSTN maintains its unique position for voice services, however, the Bell companies who control it will have a correspondingly unique incentive and ability to frustrate competition by impeding interconnection with other voice providers, regardless of whether those providers use IP or some other technology. New entrants, by contrast, lack the incumbents' customer base and bottleneck control. As Congress recognized in 1996, interconnection with the incumbents must be available on just, reasonable, and nondiscriminatory rates, terms, and conditions if broadband competition is to succeed.

An Alternative Approach

The starting point for reform of our communications laws should be to identify the problem that needs to be fixed and then to develop a focused response. Legislation focused on IP or any other particular technology sidesteps this fundamental question and, as I've suggested, will skew investments and inevitably become obsolete.

The communications marketplace is changing before our eyes, almost weekly. Entrepreneurs, inventors, service providers, and investors are not waiting for legislation to point the way to the next big thing. What is needed is a regulatory framework that recognizes these changes – and the sheer pace of change – by streamlining existing law where there is competition and by giving the FCC the tools to adapt the remaining requirements to new competition as it develops. The current environment offers the opportunity to reexamine and reevaluate all current regulation of voice, video, and data and remove barriers or burdens that are unnecessary because of the enhanced competition that IP and other technologies make possible.

For those regulations deemed necessary to retain at this time, legislation could set a clear path for their reexamination and removal as they, too, become outmoded. The FCC's forbearance authority could be extended beyond telecommunications services and the Commission could be required to forbear from all unnecessary regulation, taking into account competition from functionally equivalent offerings, regardless of technology or regulatory classification. Of course, any new framework should also ensure that providers continue to fulfill important social responsibilities.

We believe that this approach, designed to reflect the new competitive world and grow with it, would far better serve the needs of competitors and consumers than the approach suggested in the draft bill. To the extent the Committee intends to pursue the approach outlined in the draft bill, however, we would offer the following input about the draft provisions.

Specific Comments on the Bill

Above I outlined our general concerns with the discussion draft. More detail on each of these concerns follows below.

Like Services Are Not Treated Alike

As noted above, we have serious concerns with subjecting services that are functionally the same to different -- and in some cases, very different -- regulatory treatment. The draft bill is built on technology-specific distinctions that may not have real relevance in the marketplace or enhance competition or functionality. By way of example:

- packet-switched transmission is subject to the bill, while circuit-switched transport is subject to existing law;
- the definition of "packet-switched service" appears to require the separate routing of every packet, but not all packet-based protocols perform routing functions for every packet;

- requirements applicable to a BITS provider are limited to facilities-based providers, placing such providers at a competitive disadvantage vis-à-vis non-facilities-based broadband providers, such as Microsoft, Yahoo!, eBay, and other "edge" providers (in addition to Earthlink and other ISPs), who are mounting competitive challenges to facilities-based communications providers;

- the bill excludes "any time division multiplexing [TDM] features, functions, and capabilities" from the definition of BITS, even when the service (such as cable modem, DSL and FTTH) utilizes TDM and TCP/IP;

- there are different interconnection rules for VoIP providers and providers of conventional telephone service; and

- the bill foresees the use of "successor protocol[s]" only to "TCP/IP", but TCP is only one of many IP protocols.

In each of these cases, there does not appear to be any rational basis for selecting only certain IP technology for favorable treatment, when the service being provided may or may not benefit from that technology and the subscriber may or may not even know it is being used. We believe the bill should eliminate such distinctions.

Similarly, under the draft bill, broadband video service must be offered in a manner that allows subscribers to "integrate" the video aspects of the service with "customizable, interactive voice and data features," even if a subscriber never uses these features and receives only video programming service that looks exactly like a cable service. The draft bill also removes certain obligations only from broadband video service, rather than consider whether they no longer make sense for any provider of multichannel video.

Many of NCTA's members may already be offering "broadband video service" as it is currently defined and would therefore qualify for and benefit from some or all of the bill's favorable regulatory treatment. As noted above, some cable systems have integrated their video and telephony service features to allow television viewers to receive caller ID on their television screens.

Whether or not a cable company's offering meets the definition of broadband service -- and the myriad undefined attributes of this service make it impossible to know for sure -- we do not believe the bill's approach provides a sound foundation. While it is true that all "broadband video service providers" would be treated the same, in fact broadband video providers would be treated differently from cable operators against whom they compete solely on the basis of technological distinctions like the "integration" of "customizable, interactive" voice and data features. Even if customers forgo those features in favor of multichannel video that is functionally indistinguishable from cable service, the broadband video service provider retains its regulatory advantage over a cable operator.

In an industry as dynamic as video, moreover, technology-based distinctions will rapidly become obsolete. Any new legislative framework should be able to guide industry and government through changes in technology. The discussion draft, by contrast, will likely need to be amended even before it passes into law to account for new development that will inevitably emerge in the coming months. *Competitive forces* should and will propel providers to use the technologies that enable them to offer the services and features consumers want. Government interference in that natural process is far more likely to hinder than encourage this result.

The Bill is Overregulatory

We also believe the draft bill unnecessarily imports too much traditional utility regulation to competitive broadband services. It imposes numerous requirements on VoIP, BITS and broadband video services even where the competitive need to attract customers to these new services has proven sufficient to discipline competitors' conduct, and no market failure justifies a change in regulatory treatment. While the consumer protection standards in the discussion draft have been narrowed, for instance, they remain overbroad. The result is the imposition of

extensive new and burdensome regulatory requirements for services that have flourished without government involvement and without any demonstration of market failure. Truth-in-billing and other requirements -- many of which have served as vehicles for unwarranted class action lawsuits -- are unnecessary, particularly if providers remain subject to State laws of general applicability. In some cases, such as the bill's privacy and disabilities' access requirements, the draft imposes even stricter standards on broadband providers than those imposed on traditional providers.

By defining BITS to include Internet access service, moreover, the bill would impose these obligations, along with federal registration obligations and other utility-style requirements designed for monopoly common carriers, on facilities-based Internet access providers such as cable who only recently won the right to be free from regulation.

By far the most extreme example of unnecessary regulation, however, is the imposition of so-called "net neutrality" requirements on BITS providers. As discussed above, we believe the net neutrality requirement is a solution in search of a problem and would represent an unprecedented regulation of Internet services. Cable operators are not blocking consumers' access to Internet content, applications, or services or restricting the attachment of customer equipment. Although there have been claims that cable *could* use control of its broadband network to act anticompetitively, there has been only a single unproved allegation that a cable operator has done so. The cable broadband network is also designed to accommodate any gaming devices, or any other computing device the customer wants to use. Cable companies have no incentive to block content, applications, or services and thereby drive customers to DSL, satellite broadband, or other competitors waiting in the wings.

The harm to society from a net neutrality requirement would vastly outweigh any potential benefit. Requiring cable operators to offer cable Internet service in a particular way may lock them into business or technology arrangements that prevent them from responding to customers' changing interests or marketplace reality. As I explained earlier, a broad requirement "not to block, impair, or interfere with the offering of, access to, or the use of any lawful content, application, or service" will open the door to a constant stream of complaints from cable's competitors dissatisfied with the terms of proposed business arrangements and seeking to use government involvement as leverage in their negotiations with cable companies.

Nearly every commercial arrangement between facilities-based Internet service providers and Internet content providers could be challenged as "impairing" access to competing content, effectively precluding cable operators from enhancing the value of their Internet access service. Hearing and resolving complaints would tie up scarce government resources and impose substantial uncertainty in the industry at the time when it needs regulatory stability to develop this new business.

If the requirement that providers allow subscribers to "connect and use devices of their choosing in connection with BITS" is retained, the bill should clarify that the subscribers' right is limited to, for example, the right to connect any device to the cable modem and does not allow uncertified cable modems or other uncertified devices to be connected directly to the cable network. Manufacturers of devices that connect to a cable modem must bear a reasonable responsibility to ensure that their equipment evolves and is compatible with new network technologies such as VOIP. Networks cannot and should not be required to evolve -- or hold back on use of a new technology -- to suit the specifications of individual equipment manufacturers.

The discussion draft could also be read to impose new and unnecessary interconnection obligations on any cable operator that offers cable modem service, requiring them to agree to interconnection demands from telecommunications carriers and private (BIT) networks, as well as other BITS providers. Without any government mandate, cable operators have entered into peering arrangements to enable their cable modem customers to reach any site or person on the Internet. There is no need to turn this market-driven practice into a government mandate or to require cable operators to interconnect their broadband facilities to every other network.

The Bill Lacks Adequate Safeguards Against the Exercise of Market Power

While overregulatory in certain regards, in other respects the discussion draft omits critical safeguards. In particular, the bill eliminates many of the regulations that were instituted specifically because competition proved insufficient to protect against the unfair exercise of market power, even where market conditions have not yet changed in a manner that would justify a change in law. For example:

- The bill does not require incumbent carriers that control Internet backbone facilities to provide access to those facilities on a just, reasonable and nondiscriminatory basis. Telephone companies that both control Internet backbone facilities and offer retail Internet access in competition with cable operators have the incentive and the ability to discriminate against cable operators in the rates, terms, and conditions under which Internet backbone service is provided.

- The bill does not ensure that VoIP providers can interconnect with an ILEC at any technically feasible point.

- The bill does not ensure that VOIP subscribers' listings will be included in the ILEC directories (including those of independent telephone companies as well as the Bells).

- The bill lacks clear standards for facilities-based VoIP providers to interconnect with ILECs or provide any meaningful government oversight of these interconnection negotiations. ILECs will continue to provide service to the vast majority of households for the foreseeable future. Without standards and a supervisory mechanism in place, ILECs will have every incentive to delay or impede negotiations for the exchange of traffic with VOIP providers. The elimination of oversight by the FCC or State Commission heightens this danger even further.

- The bill does not guarantee VOIP service providers' right of access to pole attachments at nondiscriminatory rates, terms and conditions.

Nor does the bill provide for effective enforcement of the prohibition on redlining practices by BVS providers, despite indications that some competitors seeking to enter the market intend to deploy service based on the income of area residents. By placing the obligation on the FCC to oversee and resolve every allegation of local redlining by a broadband video service provider in every municipality in the country, the bill effectively frees BVS providers of any oversight, since the FCC clearly is not equipped with staff or resources to undertake such a role. Complaints would not be resolved in a timely manner, allowing the provider ample opportunity to benefit significantly from its discriminatory policies. Further weakening the prohibition is the fact that the bill allows providers to self-define their own service areas, allowing them to cherry pick wealthy communities for their service rollout.

We urge the Subcommittee to consider the important role that local governments can play in overseeing the deployment of multichannel video systems. While the discussion draft preserves local authority over rights-of-way, local governments should also be able to ensure that all of their citizens receive service in a timely and fair fashion, that services meet community needs, and that customer service standards are met.

As a Whole, the Bill Creates Substantial Regulatory Uncertainty

The sheer scope of the discussion draft and the undefined nature of many of its core provisions mean that, if enacted, it will inevitably result in protracted legal battles, significantly diminishing the likelihood that the bill will succeed in its goal of successfully moving communications policy into the Internet era. In many aspects, the bill actually appears to be a step backwards.

For example, as noted above, the bill seems to overrule both *Brand X* and the FCC's

recent DSL order by subjecting BITS providers to a forced access requirement. The cable and Internet access industries have only just finished *years* of litigating this issue. Likewise, the telecommunications industry has just finished *years* of litigating the UNE and interconnection provisions of the 1996 Act. Communications companies cannot focus resources and efforts on developing new services and technologies when the regulatory bar keeps changing. They cannot face ten more years of litigation. Any rewrite must make it the highest priority to provide clear guidance and regulatory stability, so that all industry members may take the necessary steps to bringing new offerings to consumers.

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Thank you again for the opportunity to appear before you today. The cable industry stands ready to work with you and your colleagues to craft revisions to the Communications Act that reflect today's realities and tomorrow's developments. I look forward to your questions.